GOVERNMENT OF MALAYSIA

v.

V.R. MENON

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HASHIM YEOP SANI CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
MOHD. YUSOFF MOHAMED SCJ
[SUPREME COURT CIVIL APPEAL NO. 172 OF 1987]
27 DECEMBER 1989

PUBLIC AUTHORITIES: *Pension Adjustment Act 1980 - Section 1(2) - Construction of - Whether non-resident pensioners entitled to benefits thereunder - Object of Act - Protection of rights to pensions under Article 147 of the Federal Constitution.*

CONSTITUTIONAL LAW: *Equality before the law - Whether s. 1(2) of Pensions Adjustment Act 1980 contrary to Article 8(1) and/or Article 147 of the Federal Constitution - Whether section discriminatory - Whether discrimination permissible - Whether classification is founded on intelligible differentia - Whether differentia has rational relation to object of statute - Principles applicable in determining permissible legislative classification in relation to equality provision of Article 8(1) - Scope of Article 147 of the Federal Constitution.*

The respondent was in the service of the appellant and retired on 1 February 1973. The respondent is an Indian citizen and has resided in Madras, India since March 1973.

The Pensions Adjustment Act 1980 ("the Act") came into force on 1 July 1980 made provision for additional benefits to pensioners and their dependents. Section 1(2) of the Act provided that the Act shall apply throughout Malaysia in respect of retired officers and their dependents who are resident in Malaysia. This meant that foreign resident pensioners like the respondent were excluded.

Prior to the filing of this action, the respondent had written to the Malaysian High Commissioner in India requesting for the increased pension payable under the Act. The Pensions Division of the Public Services Department replied to the respondent by letter ("the reply"), and rejecting the respondent's claim on the ground that the respondent is a non-Malaysian resident stated as follows:

(a) As inflation in the country has reduced the real value of pensions, the Malaysian Government has from time to time supplemented the pensions by according increases in the form of allowances ... The Government was not committed to pay such increases to pensioners resident outside Malaysia whose pensions were also affected by changes in the cost-of-living in the countries in which they were residing but nevertheless, it had in the past extended increases as a matter of concession.

(b) When the wages for employees in the public service were revised effective from 1 July 1980, the Government decided that employees who had retired before the revision should receive pensions recompute on the revised wages that they would have drawn, had they been deemed to be in service when the revision took place ... These principles

were new principles and the Government, as a matter of policy, decided that it should not extend these principles to pensioners who reside outside Malaysia. It would also be unreasonable for local tax payer to bear the additional cost of such payments.

The respondent then brought this action against the appellant seeking a declaration that he be paid his pension in accordance with the Act, as any resident pensioners in Malaysia.

In the Court below the respondent argued his case on 2 constitutional grounds; namely:

(a) that s. 192 of the Act in limiting the application of the Act to pensioners "who are resident in Malaysia" was in violation of the provision of equality as contained in Article 8(1) of the Constitution; and

(b) that Article 147 of the Constitution protects the pension rights of the respondent under the Act as the provisions of the same were more favourable to him.

The Judge found in favour of the respondent and the appellant appealed.

Held:

[1] The correct approach in determining permissible legislative classification in relation to the equality of Article 8(1) can be found in *Malaysian Bar Council & Anor. v. Government of Malaysia* and *Datuk Haji Harun bin Hj Idris v. PP*.

[2] In view of the words "who are resident on Malaysia" in s. 1(2) of the Act - the Act is indeed discriminatory against foreign-resident pensioners.

[3] As the Act is discriminatory and because the prohibition of unequal treatment in the Constitution is not absolute, the next question to consider is whether the discrimination is permissible? - Applying the *Malaysian Bar Council & Anor. v. Government of Malaysia* case: Discriminatory law is good law if it is based on "reasonable" or "permissible" classification provided that:

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different basis such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[4] The classification between foreign and local resident pensioners is founded on an intelligible differentia.

[5] Considering the reply, the object of the Act is not to give additional benefits to pensioners *per se* - the object is to ameliorate the financial difficulties in Malaysia due to the depreciating value of the Ringgit and the rising cost of living allowance in Malaysia. Although inflation is a common factor everywhere, it would be arbitrary to conclude that the rate of depreciation of the value of the Malaysian Ringgit *vis-a-vis* all foreign currencies and the rate of inflation is the same everywhere - there is therefore a rational nexus between the discrimination and the object of the Act.

[6] The Court takes a serious view that the Act is not a law concerned with fundamental rights - it is a legislation in the area of economic and social welfare to confer extra benefits to pensioners resident in Malaysia.

[7] As stated in the *Malaysian Bar Council & Anor. v. Government of Malaysia* case; to attain constitutional validity in this type of legislation, it is sufficient if the classification made by the statute has a government purpose - here, the appellant has satisfied the Court that the classification in the Act has a reasonable government purpose and the restriction imposed must be held to be constitutionally valid.

[8] The residential qualification imposed by the Act therefore constitutes a permissible discrimination and does not violate Article 8(1) and thus is not null and void under Article 4(1) of the Constitution.

[9] On the second constitutional ground, Article 147(1) only guarantees the additional pension benefits to the respondent only if the Act is applicable to him. Since the Act is not applicable to him, this argument fails.

[Appeal allowed with costs.]

Cases referred to:
Malaysian Bar & Anor. v. Government of Malaysia [1987] CLJ (Rep) 185
Datuk Haji Harun bin Hj. Idris v. PP [1977] 2 MLJ 155

Legislation referred to:
Federal Constitution, art. 8(1), 147, (1)
Pension Adjustment Act 1980, s. 1(2)

For the appellant - K.N. Segara, SFC (Hassan bin Lah, SFC with him); Pejabat Peguam Negara
For the respondent - G.T. Rajan; M/s. G.T. Rajan & Co.

JUDGMENT

Mohd. Azmi SCJ:

The Pension Adjustment Act 1980 which came into force on 1 July 1980 makes provisions for additional benefits to pensioners and their dependents. Foreign resident pensioners are however excluded by s. 1(2) of the Act which provides that the Act shall apply throughout Malaysia in respect of retired officers and their dependents "who are resident in Malaysia."

Mr. V.R. Menon, the respondent in this appeal, is an Indian citizen residing in Madras, since March 1973. He is aggrieved by the residential qualification imposed by s. 1(2) which excludes him and his dependents from the additional benefits conferred by the 1980 Pension Law. He was in the service of the Electrical Department, the predecessor of the present National Electricity Board from 16 June 1941 until he retired on 1 February 1973. It is not in dispute and the learned Judge so found that:

> He has received increases in his pension along the way as and when pensions were revised by the Government but when the 1980 Act as passed giving more benefits to pensioners and to their dependents, the plaintiff found himself precluded from receiving these additional benefits because the application of the Act was restricted to pensioners and their dependents who are residing in Malaysia.

When the respondent retired on 1 February 1973, based on his last drawn salary of RM1,500 per month, he was given a pension of RM703.13 under the then pension legislation. The pension was subsequently revised to a sum of RM1,062.50 when his salary was revised with effect from 1 July 1973 under the Harun Commission Report from RM1,500 to RM2,125. If the 1980 Act had been applied, he would have been paid an additional pension of RM322.50, thereby increasing his pension from RM1,062.50 to RM1,385 per month.

By letter dated 22 July 1980, he wrote to the then Malaysian High Commissioner in India, entitled, "New pension scheme announced by Malaysian Government - Discrimination against non-residents", wherein, he appealed to the High Commissioner "to impress on Your Excellency's Government the need to extend the new pension scheme to me and other Malaysian Government Pensioners residing in India". A copy of the letter was extended to the Minister of External Affairs, Government of India, and as expected the Malaysian High Commissioner referred the letter to the Pension Department in Kuala Lumpur. On 25 August 1980 the Director of Pensions Division of the Public Services Department rejected the respondent's claim for the increased pension given under the 1980 Act for reason that the respondent is a non-Malaysian resident. We shall in a moment refer to the relevant parts of this important letter. Accordingly, the respondent brought the present action against the Government of Malaysia seeking a declaration that he be paid his pension in accordance with the 1980 Act as any other resident pensioners in Malaysia and for other consequential reliefs.

In the Court below, the case for the respondent was argued on two constitutional grounds. Firstly, it was submitted that the provision of s. 1(2) of the 1980 Act limiting the application of its provisions to only pensioners "who are resident in Malaysia" was in violation of the equality provision of Article 8(1) of the Federal Constitution. Secondly, it was contended that Article 147 of the Constitution protected the pension rights of the respondent under the later law, i.e., the 1980 Act as it was more favourable to him. The learned trial Judge found for the respondent on both issues. At p. 10 of his judgment, he held:

> The law applicable to the pension of the plaintiff in this case is this later law - the Pension Adjustments Act 1980. Any attempt to deprive him from the benefits of this later law will amount to an arbitrary and unfair discrimination inconsistent with Article 8(1) and Article 147 of the Federal Constitution.

The learned Judge continued at p. 11:

> In the circumstances therefore I find that the classification of resident and non-resident pensioners is not based on an intelligible differentia and that the differentia is wholly unrelated to the object of the Pensions Adjustment Act 1980. The classification offends Article 8(1) of the Federal Constitution and has to be declared void. I accordingly declare that the provision in s. 1(2) of the Pensions Adjustment Act 1980 which restricts the application of the Act to residents in Malaysia is void and of no effect. The plaintiff's claim is allowed with costs. His pension is to be adjusted in accordance with the provisions of the Pensions Adjustment Act 1980 and arrears together with 8% interest per annum to be calculated on a yearly basis paid to him.

On the first issue, is the exclusion of non-resident pensioners from the Pension Adjustment Act 1980 unconstitutional for being inconsistent with the provision of Article 8(1)? That article states:

> All persons are equal before the law and entitled to the equal protection of the law.

The learned trial Judge referred to the majority judgment of Court in *Malaysian Bar & Anor. v. Government of Malaysia* [1987] CLJ (Rep) 185 and the decision of the Federal Court in *Datuk Haji Harun bin Hj. Idris v. PP* [1977] 2 MLJ 155 which set out the correct approach in determining permissible legislative classification in relation to the equality provision of Article 8(1).

The first question to be asked is, is the Pensions Adjustment Act 1980 discriminatory in view of the residential qualification imposed by the words "who are resident in Malaysia" in s. 1(2) of the Act? Mr. Segara, Senior Federal Counsel makes a weak attempt to contend otherwise, and he has no answer to the concession already made by Mr. P.M. Mahalingam, the then Counsel for the appellant, in the Court below that the restrictive provision of s. 1(2) is indeed discriminatory. In our view, there can be no doubt that the Act is discriminatory against foreign-resident pensioners.

Since the Act is discriminatory, and because the prohibition of unequal treatment in the Constitution is not absolute, the next question to be asked is, is the discrimination permissible? As stated in the Malaysian Bar Council case:

> Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification provided that:
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> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
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> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different basis such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

We find no difficulty in holding that the classification between foreign and local resident-pensioners is founded on an intelligible differentia. The only question is whether the differentia has a rational to the object sought to be obtained by the Pensions Adjustment Act 1980. For this purpose, we have to consider the reply dated 25 August 1980 addressed to the respondent by the Director-General of Public Services Department, which was quoted in full by the learned trial Judge at pp. 7 and 8 of his judgment. For our purpose, we need only refer to paras. 2 and 3 of the said letter which states:

> 2. As inflation in the country has reduced the real value of pensions, the Malaysian Government has from time to time supplemented the pensions by according increases in the form of allowances to its employees who had retired with pensions based on wages prevailing at the time of their retirement. The Government was not committed to pay such increases to pensioners resident outside Malaysia whose pensions were also affected by changes in the cost-of-living in the countries in which they were residing but nevertheless, it had in the past extended these increases as a matter of concession.
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> 3. When the wages for employees in the public sector were revised effective from 1 July 1980, the Government decided that employees who had retired before the revision should receive pensions recomputed on the revised wages that they would have drawn, had they been deemed to be in service when the revision took effect. Widows of pensioners and employees also became eligible to receive pensions for life on condition that they do not remarry. These were new principles and the Government, as a matter of policy, decided that it should not extend these principles to pensioners who reside outside Malaysia. It would also be unreasonable for local tax payer to bear the additional cost of such payments.

The object of the Act is not to give additional benefits, pure and simple, to pensioners. The object is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the ringgit, and the rise in cost of living allowance in Malaysia. Although it may be reasonable to assume that inflation is a common factor everywhere, it would be arbitrary to conclude not only that the rate of depreciation in value of the Malaysian Ringgit is the same as all foreign currencies, but also that the rate of inflation is the same everywhere. We

a therefore disagree with the learned trial Judge that the classification has no rational nexus with the object sought to be achieved by the 1980 Act. In our view, the residential qualification imposed by the Act constitutes a permissible discrimination, and therefore does not violate the equality provision of Article 8(1) and as such, it is not null and void under Article 4(1) of the Federal Constitution.

b In this appeal we take into serious consideration that the Pensions Adjustment Act 1980 is not a law concerned with fundamental rights. It is a legislation in the area of economics of social welfare to confer extra benefits to pensioners resident in Malaysia. As such, the learned Judge erred in principle when he appeared to have applied a stricter standard of review. As indicated by us in the Malaysian Bar case, to attain constitutional validity in this type of legislation, it is sufficient if the classification made by the statute has a governmental purpose. In this particular case, we are of the opinion that the appellant has satisfied us that the *c* classification in the Pension Adjustment Act 1980 has a reasonable governmental purpose, and consequently, the restriction imposed must be held to be constitutionally valid.

On the second issue, we do not comprehend the argument on Article 147(1) which provides:

> The law applicable to any pension, gratuity or other like allowance (in this article referred to as an "award") granted to a member of any of the public services, or to his widow, *d* children, dependent or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.

The provision of Article 147(1) guarantees the additional pension benefits to the respondent only if the 1980 Act is applicable to him. Since it is not applicable to him, that would be the end of the matter.

e For the reason given, we allow the appeal with costs and set aside the order of the learned trial Judge.

Also found at [1990] 1 CLJ 718

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